Tan Teck Chew v Public Prosecutor

COURT OF APPEAL (KUALA LUMPUR) — CRIMINAL APPEAL NO C–05–5 OF 1997

ABDUL HAMID MOHAMAD, KC VOHRAH JJCA AND FAIZA TAMBY CHIK J

3 JANUARY 2002

Criminal Law *— Dangerous drugs — Trafficking — Presumption — Whether presumption of possession under s 37(d) could be used to invoke presumption of trafficking under s 39B(1)(a) — Dangerous Drugs Act 1952 ss 37(d) & 39B(1)(a)*

The appellant was charged with the offence of trafficking 40.11g of heroin, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') punishable under s 39B(2) of the Act. At the close of the prosecution case, on the basis of the evidence adduced, the learned trial judge held that the appellant was in custody and control of the bag containing the heroin, and invoked s 37(d) of the Act to presume possession of the heroin in the appellant with the added presumption that he knew the nature of the heroin. The appellant was convicted for trafficking and sentenced to death. The appellant appealed to this court.

Held, allowing the appeal:

(1) The trial judge was wrong to have relied on the presumptions of possession and knowledge of the heroin under s 37(d) of the Act from his factual finding of the appellant being in control and custody of the plastic bag containing the heroin, and on the basis of such presumptions, to presume that he was trafficking in the heroin (see p 326D–E); *Muhammed bin Hassan v PP* [1998] 2 MLJ 273 followed.

(2) The appellant's defence at the trial should have been considered as a defence on the charge of possession and not on trafficking. The court was, however, satisfied that the trial judge was correct in law when he ruled, inter alia, that the appellant had failed on a balance of probability to rebut the statutory presumptions in s 37(d) of the Act that he knew that what was contained in the bag was heroin and that he was in possession of the heroin (see p 326G–H).

(3) The court allowed the appeal against the conviction on trafficking and the sentence of death and substituted therefor a conviction for possession of the heroin under s 12 of the Act and a sentence of 15 years imprisonment from the date of arrest and ten strokes under s 39A(2) thereof (see p 327A).

[Bahasa Malaysia summary

Perayu telah dituduh melakukan kesalahan mengedar heroin sebanyak 40.11g, satu kesalahan di bawah s 39B(1)(a) Akta Dadah

Berbahaya 1952 ('Akta tersebut') yang membawa hukuman di bawah s 39B(2) Akta tersebut. Pada penutup kes tersebut, berdasarkan keterangan yang dikemukakan, hakim perbicaraan yang arif telah memutuskan bahawa perayu memiliki dan mengawal beg yang mengandungi heroin tersebut, dan menggunakan s 37(d) Akta tersebut untuk menganggapkan heroin tersebut dalam milikan perayu dengan anggapan tambahan bahawa beliau mengetahui tentang sifat heroin tersebut. Perayu telah disabitkan kerana kesalahan mengedar dadah dan dijatuhkan hukuman mati. Perayu membuat rayuan ke mahkamah ini.

Diputuskan, membenarkan rayuan tersebut:

(1) Hakim perbicaraan terkhilaf apabila bergantung kepada anggapan memiliki dan mempunyai pengetahuan tentang heroin tersebut di bawah s 37(d) Akta tersebut daripada penemuan faktual beliau tentang perayu mempunyai kawalan dan milikan beg plastik yang mengandungi heroin tersebut, dan berdasarkan anggapan berikut, untuk menganggap bahawa beliau telah mengedar heroin tersebut (lihat ms 326D–E); *Muhammed bin Hassan v PP* [1998] 2 MLJ 273 diikut.

(2) Pembelaan perayu semasa perbicaraan sepatutnya dipertimbangkan sebagai satu pembelaan terhadap satu pertuduhan memiliki dan bukan mengedar dadah. Mahkamah, bagaimanapun, berpuas hati bahawa hakim perbicaraan adalah betul di sisi undang-undang apabila beliau memutuskan, antara lain, bahawa perayu telah gagal atas imbangan kebarangkalian untuk mematahkan anggapan statutori dalam s 37(d) Akta tersebut di mana beliau mengetahui bahawa apa yang terkandung di dalam beg tersebut adalah heroin dan bahawa beliau memiliki heroin tersebut (lihat ms 326G–H).

(3) Mahkamah membenarkan rayuan tersebut terhadap sabitan mengedar dadah dan hukuman mati dan menggantikan berikut dengan satu sabitan memiliki heroin di bawah s 12 Akta tersebut dan satu hukuman 15 tahun penjara daripada tarikh tangkapan dan sepuluh sebatan rotan di bawah s 39A(2) Akta tersebut (lihat ms 327A).]

Notes

For cases on the Dangerous Drugs Act 1952 s 37(d), see 4 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 77–80.

Cases referred to

Muhammed bin Hassan v PP [1998] 2 MLJ 273 (folld)

Legislation referred to

Dangerous Drugs Act 1952 ss 12(2), 37(d), (da), 39A(2), 39(B)(1)(a), (2)

Appeal from: Criminal Trial No 47–6 of 1994 (High Court, Kuantan)

Karpal Singh (*Karpal Singh & Co*) for the appellant.
Vong Poh Fah (Deputy Public Prosecutor) for the prosecution.

KC Vohrah JCA (delivering judgment of the court): At the hearing of the appeal of Tan Teck Chew against his conviction on a charge of trafficking in 44.110g of a dangerous drug, heroin, and the sentence of death accordingly passed on him, we allowed the appeal against both conviction and sentence. We instead substituted therefor a conviction for possession of the heroin under s 12(2) of the Dangerous Drugs Act 1952 ('the Act') and sentenced him to 15 years imprisonment from the date of arrest and ten strokes under s 39A(2) thereunder.

We now give our reasons. The trafficking charge against the appellant was that he, on 16 April 1994, at about 11.30pm, at a car park behind Kompleks Teruntum at Jalan Mahkota, Kuantan, Pahang, on his own behalf, had trafficked a dangerous drug, ie 40.11g of heroin, an offence under s 39(B)(1)(a) punishable under s 39(B)(2) of the Act.

At the close of the prosecution case, on the basis of the evidence adduced, the learned trial judge held that the appellant was in custody and control of the bag containing the heroin, and invoked s 37(d) of the Act to presume possession of the heroin in the appellant with the added presumption that he knew the nature of the heroin. He relied on the facts which he had set out in his judgment to base such a decision. The facts on which he relied on are fairly straightforward.

ASP Mohd Luthfi Ismail bin Abdullah ('PW2') carried out an operation at 10.30am on 16 April 1994 in order to arrest drug traffickers in the area of a car park behind the building of Kompleks Teruntum in Kuantan, Pahang. The team was broken into three groups, one of which was led by ASP Mohd Luthfi comprising himself and two others.

At 11.30pm, the ASP saw the appellant walking from the exit of the basement parking area of the building in the direction of a car park behind the building. The ASP and his two men rushed towards the man who was then holding a plastic bag. The ASP seized the package from the man and examined the bag in front of him. Inside the bag were two packages which were secured with cellophane tape. The bundles contained a red colored substance which the government chemist ('PWI') subsequently analyzed and found to contain 40.11g of heroin, a dangerous drug listed under the First Schedule to the Act.

The man was arrested and brought to the Pahang Police Headquarters after which he led the police to his house where no drugs were found.

These were essentially the facts, the primary facts, set out by the trial judge when he decided to call the appellant to make his defence. The trial

judge held that at the close of the prosecution case, the facts established that the appellant was in control and custody of the plastic bag. He then relied on s 37(d) of the Act to presume that the appellant was in possession of the drugs and to presume that he knew the nature of the drug.

This is what the learned trial judge stated:

> Dari keterangan di atas, saya berpuas hati, di akhir kes pendakwaan, tanpa keraguan yang munasabah, bahawa semasa ditangkap tertuduh sedang membawa satu beg plastik yang mengandungi dua bungkusan kertas suratkhabar. Di dalam setiap bungkusan kertas surat khabar itu terdapat satu beg plastik yang mengandungi serbuk ketulan berwarna kemerahan yang disahkan oleh SP1 mengandungi heroin. Jumlah berat bersih heroin itu ialah 40.11g. Memandangkan bahawa beg plastik itu berada di dalam jagaan dan kawalan tertuduh semasa ditangkap maka mengikut s 37(d) Akta Dadah Berbahaya 1952 ('Akta tersebut') tertuduh adalah dianggap memiliki dadah heroin tersebut dan mengetahui jenis dadah tersebut sehinggalah dibuktikan sebaliknya. Berdasarkan alasan-alasan di atas, saya memutuskan bahawa di akhir kes pendakwaan pihak pendakwa telah berjaya membuktikan kesnya melampaui sebarang keraguan yang munasabah. Dengan itu, saya telah memanggil tertuduh untuk membela diri di atas pertuduhan yang dikemukakan terhadapnya.
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> (From the evidence as set out above, I am satisfied that at the close of the prosecution case that, without a reasonable doubt, when the accused was arrested he carried a plastic bag which contained two packages wrapped in newspapers. In each newspaper package was found a plastic bag containing a powdery and granular substance red in colour which was found by PW1 (the Government Chemist) to contain heroin. The nett weight of the heroin was 40.11g. Having regard to the fact that the plastic bag was in the custody and control of the accused at the time of the arrest then, pursuant to s 37(d) of the Dangerous Drugs Act 1950 ('the Act'), the accused is presumed to be in possession of the heroin and to have known the nature of the said drug until the contrary is proved. On the basis of the above stated ground, I held that at the close of the prosecution case the prosecution had proved its case beyond any reasonable doubt. With that I called upon the accused to make his defence on the charge against him.)

It will be noted from this passage that the counsel had only found as a fact, on the basis of the evidence before him, that the appellant was only in custody and control of the plastic bag containing the heroin. It was not an affirmative finding on the evidence that he was in possession of the bag, much less of the heroin contained therein. There was of course no finding of knowledge of the heroin in the bag. The trial judge had to rely on s 37(d) of the Act to infer as a presumption that the heroin contained in the plastic bag was in his possession, and to infer as a presumption that he knew of the nature of the heroin.

Section 37(d) of the Act reads as follows:

> In all proceedings under this act or any regulation made thereunder —
>
> (a) ....
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> ....
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> (d) any person who is found to have had in custody or under his control anything whatsoever containing any dangerous drug shall, until the

A contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug;

(e) ....

Having relied on the presumptions in s 37(d) of the Act, the trial judge then B called upon the appellant to make his defence upon the charge of trafficking. Although he did not mention it at that stage, it is apparent from the later part of his judgment (when he discussed the defence of the appellant) that he had relied on s 37(da) of the Act to presume that the appellant was trafficking in the said drug as he had been presumed to be in possession of the 44.11g of heroin because of the application of s 37(d) of the Act which C gave rise to such presumption of possession.

In all proceedings under the Act or any regulation thereunder —

(a) ....

....

D (da) any person who is found in possession of:

....

(i) 15g or more in weight in of heroin;

otherwise than in accordance with the authority of this Act or any other written law, shall be presumed, until the contrary is proved, to be trafficking in the said drug;

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The trial judge gave his grounds of decision on 23 February 1997. On 9 December 1997, the Federal Court in *Muhammed bin Hassan v PP* [1998] 2 MLJ 273 clarified that the presumption of trafficking under s 37(da) of F the Act cannot be invoked upon the presumption of possession that arises under s 37(d) of the Act through mere proof of custody or control of the thing containing a dangerous drug. This is what the Federal Court observed at p 288:

In our view, there is a clear undeniable distinction between the word 'deemed' used in s 37(d) and the word 'found' employed in s 37(da) of the Act. The G 'deemed' state of affairs in s 37(d) (ie deemed possession and deemed knowledge) is by operation of law and there is no necessity to prove how that particular state of affairs is arrived at. There need only to be established the basic or primary facts necessary to give rise to that state of affairs, ie the finding of custody or control. Such presumptions as under s 37(d) (and, for that matter, the one under s 37(da)) are sometimes described as 'compelling H presumptions' in that upon proof of certain facts by a party (in our present case, proof of custody or control in s 37(d) by the prosecution), the court must in law draw a presumption in its favour (ie presumptions of possession and knowledge) unless the other party proves the contrary. Such a presumption has the compelling force of law. It is a deduction which the law requires the trial court to make. On the other hand, the word 'found' in the opening phrase of s 37(da) connotes a finding after a trial by the court. I

The court in elaborating further on the interpretation of s 37(da) of the Act stated:

> Furthermore, the basic or primary facts needed to raise 'deemed' possession and 'deemed' knowledge under s 37(d) of the Act and those required to raise 'presumed...trafficking' under s 37(da) are different. To come to the presumptions of possession and knowledge under s 37(d), one need only to arrive at a finding of having had 'in custody or under... control anything whatsoever containing' the drug (as opposed to the drug itself) whereas to arrive at the presumption of 'trafficking' under s 37(da), a finding of being 'in possession' of the drug is necessary (in addition, of course, to proof of the relevant minimum quantity specified). In view of the above differences, it would be unduly harsh and oppressive to construe the automatic application of presumption upon presumption as contended by the learned deputy public prosecutor — a construction that ought to be adopted only if, upon the wordings of the two subsections, such an intention of the Parliament is clear, which, in our opinion, is not.
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> In our view, to constitute 'possession' under s 37(da) of the Act, so as to be capable of forming one of the ingredients thereunder thereby giving rise to the presumption of trafficking, there must be an express affirmative finding (as opposed to legal presumption) of possession as understood in criminal law, based on evidence.

In our case, the trial judge was therefore wrong to have relied on the presumptions of possession and knowledge of the heroin under s 37(d) of the Act from his factual finding of the appellant being in control and custody of the plastic bag containing the heroin, and on the basis of such presumptions, to presume that he was trafficking in the heroin. The defence should have been called on the charge of the possession of the heroin.

We like to point out that the learned DPP, Mr Vong, had argued that there was enough evidence adduced by the prosecution to show that the appellant had knowledge as to what he was carrying in the bag, but as Mr Karpal Singh for the appellant had pointed out, the trial judge's finding at the close of the prosecution case on the evidence was that the appellant had custody and control of the bag, and not a finding that there was affirmative evidence that he had possession of the heroin or knowledge thereof. We agree with Mr Karpal Singh; it would be wrong for this court to interfere with that finding because if the trial judge was of the view that there was sufficient evidence for him to conclude ex facie that the appellant had such possession and knowledge, he would have so stated, but instead he relied on the presumption of possession and knowledge under s 37(d) of the Act.

The appellant's defence at the trial should have been considered as a defence on the charge of possession and not on trafficking. We are, however, satisfied that the trial judge was correct in law when he ruled, inter alia, that the appellant had failed on a balance of probability to rebut the statutory presumptions in s 37(d) of the Act that he knew that what was contained in the bag was heroin and that he was in possession of the heroin. We ignored his ruling on trafficking where he applied the presumption of trafficking in s 37(da) of the Act upon the presumptions of possession and knowledge of the heroin under s 37(d) of the Act, which, as we have stated, cannot be done.

A It is for these reasons we allowed the appeal against the conviction on trafficking and the sentence of death and substituted therefor a conviction for possession of the heroin under s 12 of the Act and a sentence of 15 years imprisonment from the date of arrest and ten strokes under s 39A(2) thereof.

B *Appeal allowed.*

Reported by Peter Ling

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